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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1948

No. 695

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSE UNION (CIO),
Petitioner (Intervenor Below),

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent (Respondent Below)
and
COLGATE-PALMOLIVE-PEET COMPANY (a corporation),
Respondent (Petitioner Below),
and
INTERNATIONAL CHEMICAL WORKERS UNION, AFL, et al.,
Respondents (Intervenors Below).

see No. 47 of 1949 for opposition

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit, and BRIEF IN SUPPORT THEREOF.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause (R. 997) which enforces a decision and order of the National Labor Relations Board (R. 68-85). This is a companion petition to the petition for writ of certiorari being filed simultaneously by respondent Colgate-Palmolive-Peet Company, a corporation.

OPINIONS BELOW.

The opinion (R. 990-992) of the Circuit Court of Appeals is not yet reported. The decision and order of the National Labor Relations Board (R. 68-85) are reported in 70 N.L.R.B. 1202. Petitioner intervened in the proceeding below, by order of the Circuit Court of Appeals (R. 143).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 13, 1949, and rehearing was thereafter denied. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. Section

347) and upon Section 10(f) of the National Labor Relations Act.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor or-

ganization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Sec. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE.

On July 9, 1941, Colgate-Palmolive-Peet Company, petitioner below, hereinafter called the Company, and Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union (CIO), petitioner herein, hereinafter called Local 6, entered into a contract covering the production and maintenance em-

ployees at the Company's Berkeley, California, plant. The contract provided that it was to "remain in effect unless and until changes became necessary because of conditions beyond the control of the Company or request by their employees through their representatives" (R. 788). Section 3 of the agreement embodied a closed shop provision requiring that new employees be hired through the offices of Local 6 or in the event that Local 6 was "unable to furnish competent workers", that new employees apply for membership in the local within fifteen days of their employment, and further requiring as a condition of their employment that employees be in good standing (R. 787-788, 223). On July 24, 1945, a supplemental agreement was entered into which extended the 1941 contract by providing that the contract should "remain in full force and effect" pending the approval or disapproval by the Tenth Regional War Labor Board of certain changes (R. 788-789, 223). It is undisputed that the closed shop contract was in effect at the time of the events hereinafter referred to.

For a number of months prior to July, 1945, there had been friction between the officers of Local 6 and a group of employees at the plant, led by five shop stewards (Marshall, Haynes, Moreau, Smith and Luchsinger) and William Sherman, a former business agent of Local 6 who had been defeated for reelection. The record indicates that the friction centered around the anti-Negro, anti-President Harry Bridges and anti-political action policies of the dissident group, as well as the stewards' neglect of the duties of their

office (R. 725-726; 763-768; 862-864, 865). The conflict was wholly concerned with internal union policies, and involved no question of sympathy with any rival organization.

The long-standing friction reached a crisis on July 30, 1945 when the officials of Local 6, exasperated by the refusal of the five stewards to call a shop meeting to discuss proposed contract amendments and other matters of concern to the employees (R. 767-768), notified the five of their suspensions from the union pending a trial on charges of violating union policies (R. 791; 793-794). The company acquiesced in the union's demand for the removal of the suspended employees from its payroll pending the outcome of the trial upon the charges (R. 523-525, 538-539). The suspensions and removals were countered by a wildcat strike led by employees Sherman, Thompson, Lonnberg and Olsen, who, together with the five stewards, made up the "Strategy Committee" which directed the strike action (R. 677, 533, 366).

The strike lasted approximately three days (R. 677, 533). The stoppage held up the plant's production of glycerine, a vital war material needed by our armed forces then engaged in fighting in the Pacific (R. 559).

At the meeting at which the unauthorized wartime strike was called, the stewards and the dissident employees who followed them unanimously passed a resolution withdrawing from Local 6 and severed their affiliation with that union (R. 198-201; 848-850).

The same day they sent telegrams to the Company and Local 6 notifying them of the withdrawal (R. 786).

Despite the withdrawals, Local 6 went ahead with the trial of the employees involved, upon charges of illegally engaging in a wartime strike in violation of the union's no-strike pledge (R. 856-866; R. 867-875). In all some 37 employees, admitted ringleaders and active participants in the illegal walkout, were suspended from employment at the request of Local 6 and thereafter brought to trial on the aforementioned charges (R. 806-807, 654-656). Some of the employees pleaded guilty to the charges, while others walked out of the hearings and still others refused to appear (R. 858, 870, 871). After the presentation of evidence, the trial boards made their findings and decisions and recommended certain disciplinary action —expulsion in the case of the leaders and more serious violators, suspension with opportunity of reinstatement after a probationary period in the case of others (R. 866, 874-875).

The trial examiner who heard the testimony found that the employer had no knowledge of any discriminatory purpose on the part of Local 6 toward the discharged employees and held that their discharge was justified under the closed-shop contract (R. 68). The National Labor Relations Board reversed the decision of the trial examiner and held that the employer knew when it discharged the employees in question that the union's demand was based on the anti-CIO activities of the employees. It thereafter

held, in accordance with the so-called *Rutland Court*[1] doctrine, that since the discharges took place at a time appropriate for a change of representatives by the employees, the closed-shop contract was not a justification and that the discharges violated Section 8(1) and (3) of the Act (R. 76). It ordered the employer, among other things, to reinstate the discharged employees with back pay.

The Company petitioned to review and set aside the Board's order (R. 101-126). On February 7, 1947, pursuant to and at their respective requests (R. 144-150, 151-155) the Circuit Court of Appeals entered an order permitting the intervention in the proceedings of petitioner Warehouse Union Local 6 and International Chemical Workers Union, AFL.

QUESTIONS PRESENTED AND ERRORS OF THE CIRCUIT COURT OF APPEALS SPECIFIED.

1. Whether the National Labor Relations Board abused its discretion by ordering the reinstatement with back pay of employees who willfully and knowingly engaged in an unauthorized strike during wartime in violation of the no-strike pledge of the union to which they belonged.

2. Whether the National Labor Relations Board erred in holding that an employer violated Section 8(3) of the Act by discharging employees under a valid closed-shop contract at the demand of the con-

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[1] *Matter of Rutland Court Owners, Inc.*, 44 N.L.R.B. 587, 46 N.L.R.B. 104.

tracting union, where said employees had voluntarily resigned from the union prior to their discharge.

3. Whether the Circuit Court of Appeals erred in enforcing the decision and order of the National Labor Relations Board.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) Important questions of federal law concerning the National Labor Relations Act are here involved which have not been determined by this Court. The principle one is the important question of whether employees who instigate stoppages of production in important war industries in wartime, in violation of the no-strike pledge of their own union, are entitled to reinstatement with back pay under the Act.

ARGUMENT.

I.

THE NATIONAL LABOR RELATIONS BOARD ABUSED ITS DISCRETION IN ORDERING THE REINSTATEMENT WITH BACK PAY OF EMPLOYEES WHO ENGAGED IN AN UNAUTHORIZED WARTIME STRIKE IN VIOLATION OF THEIR UNION'S NO-STRIKE PLEDGE.

There is no dispute that the thirty-seven employees who were discharged in this case were the instigators and active participants in a strike which was carried on at the height of the nation's campaign against the Japanese enemy in the Pacific. The strike was carried on in defiance of their union's solemn no-strike pledge

(R. 871, 872) and constituted the only blot on the otherwise perfected wartime record of the International Longshoremen's and Warehousemen's Union, a record of which the union is justly proud. It resulted, as we have pointed out above, in interrupting the production of glycerine, a commodity vitally needed in the production of explosives for the armed forces.

The question raised by the petitioner is not whether or not the discipline of the employees was discriminatory, or whether or not the employer had knowledge of the alleged fact that the action of Local 6 was based on the rival union activities of the discharged employees. Solely for purposes of argument, it will be assumed that the discharges were in violation of the Act. The question remains whether reinstatement with back pay should be awarded to employees who are guilty of flagrant misconduct such as is here involved. If this Court in *Fansteel Metallurgical Corp. v. National Labor Relations Board,* 306 U.S. 240, could hold the reinstatement of sitdown strikers to be an abuse of the Board's discretion; if in *Sands Manufacturing Company v. National Labor Relations Board,* 306 U.S. 332, the Court could hold that the Board exceeded its discretion in ordering the reinstatement of employees who had been discharged by their employer for the repudiation of a collective bargaining agreement; if the Seventh Circuit in *National Labor Relations Board v. United Biscuit Company,* 128 F. (2d) 771, could hold that persons who engaged in a sympathetic strike in violation of a collective bargaining contract are not entitled to reinstatement—how

much less defensible is the reinstatement of employees who deliberately sabotaged the production of vital war materials in the midst of a war in which the nation's survival was at stake? Conduct such as that of the 37 wartime strikers could not possibly "effectuate the policies" of the National Labor Relations Act (Section 10 (c)). We submit that to condone such conduct would unfairly penalize the thousands of members of the International Longshoremen's and Warehousemen's Union and other labor organizations who endured hardship and provocation during the war and nevertheless stuck loyally to their jobs. We respectfully urge that, irrespective of the merits of the unfair labor practice issue, there should be no reinstatement of persons who callously disregarded their union's solemn commitment and thereby imperilled the nation's welfare at a critical time.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN EXTENDING THE RUTLAND COURT DOCTRINE TO ILLEGALIZE THE DISCHARGE UNDER A VALID CLOSED SHOP CONTRACT OF EMPLOYEES WHO VOLUNTARILY WITHDREW FROM THE CONTRACTING UNION PRIOR TO THEIR DISCHARGE AND THEREBY DISQUALIFIED THEMSELVES FOR EMPLOYMENT.

The present petitioner, unlike the Company which has filed a companion petition for writ of certiorari, does not challenge the validity of the doctrine of the *Rutland Court Owners* case (44 N.L.R.B. 587, 46 N.L.R.B. 104. That doctrine holds that the proviso to Section 8(3) of the National Labor Relations Act

does not require or permit an employer to comply with the closed shop provisions of a contract when, to his knowledge, discharges pursuant to the contract are sought by the contracting union as a penalty for rival union activities carried on during a period when it is appropriate for the employees to seek redetermination of representatives. In the *Rutland Court Owners* case, as in *Matter of Portland Lumber Mills* (64 N.L.R.B. 159) and other cases in which the doctrine has been enunciated, the employees concerned, while manifesting their resire to be represented by another union, did everything possible to maintain their good standing in the contracting union. In the present case the employees did everything in their power to terminate their connection with the contracting union, including a formal resignation (R. 469-470, 786). To hold that employees who deliberately place themselves in bad standing in the contracting union are immune from the enforcement of a closed-shop agreement during its term, would be to place a premium on contract violation.

Wherefore, for the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, Oakland, California,
March 28, 1949.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION, LOCAL 6 (CIO),
Petitioner.

By BERTRAM EDISES,
Counsel for Petitioner.

Certificate of Counsel

I, Bertram Edises, counsel for the petitioner, do hereby certify that in my judgment the foregoing Petition for Writ of Certiorari is well founded, and I further certify that the same is not interposed for delay.

Dated, Oakland, California,
March 28, 1949.

Bertram Edises,
Counsel for Petitioner.